Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(I)-3–03 OF 2015 (W)
ABDULL HAMID EMBONG, SURIYADI, HASAN LAH, AZAHAR MOHAMED AND ZAHARAH IBRAHIM FCJJ
26 JANUARY 2016

Civil Procedure — Judgments and orders — Garnishee order — Judgment debtor ('JD') pledged FD accounts with respondent as security for banking facilities granted — Appellant obtained judgment in Singapore that monies in FD accounts were to be garnished and used for payment of debt due to appellant — Respondent exercised right of set off for its own benefit — Whether money sought to be attached belonged to JD — Whether set off in accordance with letter of set off — Whether assignment of accounts by JD to respondent made for good consideration — Whether garnishment order nisi binding on respondent bank — Whether respondent bona fide recipient for value without notice of monies in accounts — Whether respondent had first priority to satisfy JD's debt — Whether appellant had better claim to monies in FD accounts by virtue of Singapore judgment — Whether respondent ought to have intervened during JD's application of setting aside garnishment order nisi — Whether respondent permitted to deal with monies in FD accounts — Estoppel — Whether respondent estopped from re-litigating issue of its right of set off

Trusts and Trustees — Constructive trust — Whether respondent held monies in FD accounts as constructive trustee for appellant — Whether respondent at liberty to exercise its right of set off and utilise monies for its own benefit

The respondent bank had granted housing loan and overdraft banking facilities ('banking facilities') to one Mohamad Najib bin Mohamad Amin, the judgment debtor ('the JD'), and as part of the securities, the JD's monies in six fixed deposit accounts ('the FD accounts') were pledged with the respondent. The pledge was in the form of a letter of set off. In 2000, the appellant sued the JD in the Singapore High Court in relation to a massive fraud committed by the JD against the appellant. On 30 August 2002, the appellant obtained judgment in the sum of US$79m against the JD ('the Singapore judgment'). The Singapore High Court had also found that the monies in the FD accounts held by the respondent were held on trust for the appellant. The Singapore judgment was registered by the appellant in the Kuala Lumpur High Court. On 12 March 2003, the appellant filed an ex parte application naming the respondent as a garnishee for an order that all monies owed by the respondent

to the JD be garnished and used for payment of the debt due under the Singapore judgment, pursuant to O 49 of the RHC. The application, which was granted in terms on 14 January 2004, was served on the respondent. However, on 10 March 2004, the bank chose to exercise its right of set off and proceeded to uplift the FD Accounts and use the monies to pay off the JD's debt due to the respondent. After realising the securities, only a sum of RM67,664.27 was left in the JD's accounts with the respondent. The respondent submitted that only this remaining sum was subject to the garnishment order nisi that had to be paid to the appellant in compliance with the High Court order. The JD's application to set aside parts of the garnishment order nisi was dismissed by the senior assistant registrar ('SAR'). The JD then filed an appeal, which failed before the High Court judge. On 8 October 2013, the SAR granted the garnishment order absolute ('order absolute'). The respondent filed an appeal against the decision of the SAR, which was dismissed by the High Court. The High Court judge found that the respondent despite having full knowledge of the Singapore judgment which had been registered in the Kuala Lumpur High Court, had exercised its right of set off to pay off the judgment debtor's overdraft. The judge also held that the respondent held the monies as constructive trustee for the appellant. As such, the High Court ordered the respondent to pay to the appellant the sum of RM350,447.46, being the amount from the FD accounts as at 13 April 2009, the sum of RM64,667.27, being the surplus amount after the realisation of all the securities with costs of RM5,000. The respondent appealed to the Court of Appeal. In reversing the decision of the High Court, the Court of Appeal held inter alia that the respondent was not bound by the Singapore judgment and that it was a bona fide recipient for value without notice of the monies in the FD accounts, which could not be affected by illegal conduct; and that as the JD had no claim on the monies in the FD accounts until the secured amount had been fully paid, when the appellant stepped into the JD's shoes it too had no claim on the monies. Subsequently the appellant obtained leave to proceed with the present appeal. In this appeal the appellant submitted that the respondent ought to have intervened during the JD's application of setting aside the garnishment order nisi or at the stage of the JD's appeal against the dismissal of his setting aside order. As the respondent had failed to do so, it was the appellant's argument that the respondent was therefore estopped from relitigating and rearguing this issue of right of set off. The appellant further argued that the respondent had known that the Singapore court had declared the monies in the FD accounts to be held on trust by the JD for the appellant. Thus the appellant contended that the respondent held the monies as constructive trustee for the appellant and was not at liberty to exercise its right of set off and utilise the monies for its own benefit. In short, the appellant contended that the respondent was duty-bound to obey the garnishment order nisi and was not permitted to deal with the monies in the FD accounts, as provided for under O 49 r 3(2) of the Rules of the High Court 1980 ('the RHC'). The respondent in turn submitted that the JD's application did not

fully ventilate or adjudicate the issue of the respondent's right to set off the FD accounts. Therefore, the JD's application did not affect or abdicate the rights of the respondent as provided for under O 49 of the RHC. The respondent also claimed to have acquired legal and equitable rights to the FD accounts.

Held, dismissing the appeal with costs of RM20,000:

(1) **(per Suriyadi FCJ, majority)** In order to entitle a garnishor to enter judgment against a garnishee, the garnishor should at the outset establish that the money sought to be attached belonged to the JD. Upon perusing the letter of set off in the present case, it was abundantly clear that the assignment of the FD accounts by the JD to the respondent was made for good consideration as a security for the facilities. The respondent was entitled to withhold the FD accounts, and contractually permitted to exercise its right of set off in the event the JD failed to regularise his accounts. As such, the respondent had obtained an equitable right much earlier than the service of the garnishee order and thus could not be denied its legal and contractual right to set off and utilise the funds in the FD accounts (see paras 52 & 56–58).

(2) **(per Suriyadi FCJ, majority)** Further, there was nothing to stop the respondent from calling the facilities pursuant to cl 7(h) of the letter of offer for the housing loan, which provided that the monies outstanding under the banking facility would become immediately repayable when any legal proceedings were filed against the JD. In this case, the court proceedings in Singapore or the garnishment order nisi would fall squarely within the ambit of cl 7(h) of the letter of offer, thus enabling the respondent to demand repayment and thenceforth set off the FD accounts. The set off therefore was in accordance with the letter of set off which allowed the same towards satisfaction of the facilities when they actually became due and payable. Hence, even though the respondent as a garnishee was put on notice that the funds were held by the JD on trust for the appellant/judgment creditor, the respondent had first priority to satisfy the JD's debt by virtue of the chronology of events and the effect of the equitable assignment. In short the garnishment order nisi was not binding on the respondent, as it had obtained legal rights over the FD accounts before the Singapore judgment of 30 August 2002 (see paras 59–62).

(3) **(per Suriyadi FCJ, majority)** The Court of Appeal rightfully held that the respondent had no duty to intervene in the JD's application as the dispute was between the appellant and the JD and it was premised on the Singapore judgment, in a case in which the respondent was not a party. More importantly, the respondent was never informed at all material times that it was to hold monies in the FD accounts on trust for the appellant. In any case, the issue or cause of action between the appellant

and the respondent was different from that in the JD's application. The respondent was not bound by the outcome of the JD's proceedings as it was not a party to it. Neither were its rights litigated on its behalf. Further, the respondent had taken all necessary steps in accordance with O 49 of the RHC by disputing it during the show cause stage (see paras 68, 71–73 & 75).

(4) **(per Suriyadi FCJ, majority)** It was not incumbent on the respondent, as a bank, to ascertain the source of monies which customers bring into the bank. In the following case, there was no evidence that at the time of the set off the respondent was aware that the monies in the FD accounts were declared as trust monies by the Singapore judgment. As such, it was clear that the respondent was a bona fide recipient for value without notice and the respondent's right of set off by uplifting the FD accounts could not be defeated (see paras 78 & 85).

(5) **(per Suriyadi FCJ, majority)** In order for the appellant to succeed on the constructive trust argument, it had to overcome the threshold of the combined objective and subjective tests. This meant that apart from deciding whether the respondent in the current appeal was dishonest by the ordinary standards of reasonable and honest people, the additional question of whether the respondent knew on a subjective test that its act was dishonest when uplifting the FD accounts, had to be satisfied. From the evidence, in particular the contents of the letter of set off, subjectively the respondent believed that it had a right to uplift the securities and utilise the monies for its own benefit. With the burden on the appellant to establish the basic ingredients, it was apparent that the appellant has failed to establish that conjoined subjective test. On that premise the constructive trust argument posed by the appellant against the respondent had to fail. Thus, the Court of Appeal was right when it decided that the garnishee had successfully shown sufficient cause why the garnishment order nisi should not be made absolute (see paras 79–82 & 84).

(6) **(per Hasan Lah FCJ, dissenting)** Having carefully considered the facts and circumstances of the instant case and the authorities it was clear that the respondent was estopped by conduct from relitigating the issue relating to its right of set off. The respondent was content to stand by and see its battle fought by the JD on the issue of its right of set off over the FD accounts and as such it was bound by the result. Having allowed its battle to be fought by the JD, and the JD having failed in its arguments, the respondent then opposed the JD's application to set aside parts of the garnishment order nisi on exactly the same grounds thereby relitigating the issue and effectively seeking to reverse the High Court judge's finding through the back door. The respondent should not be allowed to reopen its case. By answering the first issue in this appeal in the affirmative it was

unnecessary to deal with the other two issues canvassed by the appellant and disposing off the appeal (see paras 112 & 136–138).

[Bahasa Malaysia summary

Responden bank telah memberikan pinjaman perumahan dan kemudahan perbankan overdraf ('kemudahan perbankan') kepada Mohamad Najib bin Mohamad Amin, penghutang penghakiman ('PP'), dan sebagai sebahagian daripada sekuriti, wang PP dalam enam akaun deposit tetap ('Akaun DT') telah dicagarkan dengan responden. Cagaran itu adalah dalam bentuk surat penepian. Pada 2000, perayu telah menyaman PP di Mahkamah Tinggi Singapura berkenaan penipuan besar-besaran yang dilakukan oleh PP terhadap perayu. Pada 30 Ogos 2002, perayu telah memperoleh penghakiman berjumlah US$79 juta terhadap PP ('penghakiman Singapura'). Mahkamah Tinggi Singapura juga mendapati bahawa wang dalam akaun DT yang dipegang oleh responden telah dipegang atas amanah untuk perayu. Penghakiman Singapura telah didaftarkan oleh perayu di Mahkamah Tinggi Kuala Lumpur. Pada 12 Mac 2003, perayu telah memfailkan permohonan ex parte menamakan responden sebagai garnisi untuk perintah agar semua wang yang terhutang oleh responden kepada PP diganisikan dan digunakan untuk bayaran hutang yang perlu dibayar di bawah penghakiman Singapura itu, menurut A 49 KMT. Permohonan itu, yang diberikan pada 14 Januari 2004, telah disampaikan ke atas responden. Walau bagaimanapun, pada 10 Mac 2004, bank tersebut memilih untuk menggunakan haknya untuk penepian dan meneruskan untuk mempertingkatkan akaun DT itu dan menggunakan wang itu untuk membayar hutang yang perlu dibayar PP kepada responden. Selepas merealisasikan sekuriti tersebut, hanya sejumlah RM67,664.27 yang tinggal dalam akaun PP dengan responden. Responden berhujah bahawa hanya jumlah yang tinggal ini tertakluk kepada perintah garnisi nisi yang perlu dibayar kepada perayu bagi mematuhi perintah Mahkamah Tinggi. Permohonan PP untuk mengetepikan beberapa bahagian perintah garnisi nisi telah ditolak oleh penolong kanan pendaftar ('PKP'). PP itu kemudian telah memfailkan rayuan, yang gagal di hadapan hakim Mahkamah Tinggi. Pada 8 Oktober 2013, PKP telah memberikan perintah garnisi mutlak (perintah mutlak). Responden telah memfailkan rayuan terhadap keputusan PKP, yang telah ditolak oleh Mahkamah Tinggi. Hakim Mahkamah Tinggi mendapati bahawa responden meskipun mempunyai pengetahuan penuh tentang penghakiman Singapura itu yang telah didaftarkan di Mahkamah Tinggi Kuala Lumpur, telah melaksanakan haknya untuk penepian bagi menjelaskan overdraf penghutang penghakiman. Hakim juga memutuskan bahawa responden telah memegang wang itu sebagai pemegang amanah konstruktif bagi pihak perayu. Oleh itu, Mahkamah Tinggi memerintahkan responden membayar kepada perayu sejumlah RM350,447.46, iaitu jumlah dari akaun DT setakat 13 April 2009, sejumlah RM64,667.27, iaitu jumlah lebihan selepas realisasi kesemua sekuriti dengan kos RM5,000. Responden telah merayu kepada Mahkamah Rayuan. Dalam

mengakas keputusan Mahkamah Tinggi, Mahkamah Rayuan memutuskan, antara lain, bahawa responden tidak terikat dengan penghakiman Singapura itu dan bahawa ia adalah penerima untuk nilai tanpa notis bagi wang dalam akuan DT itu, yang tidak boleh terjejas oleh perlakuan yang menyalahi undang-undang; dan bahawa kerana PP tidak mempunyai tuntutan ke atas wang dalam akaun DT sehingga jumlah bercagar itu telah dibayar sepenuhnya. Apabila perayu berada dalam kedudukan PP ia juga tiada tuntutan ke atas wang tersebut. Berikutan itu perayu telah memperoleh kebenaran untuk meneruskan rayuan ini. Dalam rayuan ini perayu berhujah bahawa responden patut campur tangan semasa permohonan PP untuk mengetepikan perintah garnisi nisi atau di peringkat rayuan PP terhadap penolakan perintah penepiannya. Oleh kerana responden telah gagal berbuat demikian, ia adalah hujah perayu bahawa responden dengan itu diestopkan daripada melitigasi semula dan menghujah semula isu berhubung hak penepian ini. Perayu selanjutnya bersetuju bahawa responden mengetahui bahawa mahkamah Singapura telah menyatakan wang dalam akaun DT itu dipegang atas amanah oleh PP bagi pihak perayu. Oleh itu perayu berhujah bahawa responden telah memegang wang itu sebagai pemegang amanah konstruktif bagi pihak perayu dan bukan bebas melaksanakan haknya untuk mengetepikan dan menggunakan wang itu bagi faedahnya sendiri. Pendek kata, perayu berhujah bahawa responden telah terikat untuk mematuhi perintah garnisi nisi dan tidak dibenarkan untuk menguruskan wang dalam akaun DT itu, sepertimana diperuntukkan di bawah A 49 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden sebaliknya berhujah bahawa permohonan PP tidak menjejas atau mengurangkan hak responden sepertimana diperuntukkan di bawah A 49 KMT. Responden juga mendakwa telah memperoleh hak sah dan saksama terhadap akaun DT itu.

Diputuskan, menolak rayuan dengan kos sebanyak RM20,000:

(1) **(oleh Suriyadi HMP, majoriti)** Bagi tujuan memberi hak penggarnis memasuki penghakiman terhadap yang digarnis, penggarnis hendaklah pada mulanya membuktikan bahawa wang yang dipohon untuk dikaitkan adalah milik PP. Setelah meneliti surat penepian dalam kes ini, ia jelas bahawa penyerahhakkan akaun DT oleh PP kepada responden dibuat untuk balasan baik sebagai sekuriti untuk kemudahan tersebut. Responden berhak menahan akaun DT itu, dan secara kontraktual dibenarkan untuk melaksanakan haknya untuk penepian sekiranya PP gagal menyelaras akaunnya. Oleh itu, responden telah memperoleh hak saksama lebih awal daripada penyampaian perintah yang digarnis dan tidak boleh dinafikan hak sah dan kontraktualnya untuk mengetepikan dan menggunakan wang dalam akaun DT itu (lihat perenggan 52 & 56–58).

(2) **(oleh Suriyadi HMP, majoriti)** Selanjutnya, tiada apa yang menahan responden daripada memohon kemudahan itu menurut klausa 7(h) surat

tawaran untuk pinjaman perumahan, yang memperuntukkan bahawa baki wang di bawah kemudahan perbankan dengan serta merta boleh dibayar semula jika apa-apa prosiding perundangan difailkan terhadap PP. Dalam kes ini, prosiding mahkamah di Singapura atau perintah garnisi nisi akan terjatuh dalam skop klausa 7(h) surat tawaran itu, dengan itu membolehkan responden menuntut bayaran balik dan seterusnya mengetepikan akaun PP. Penepian tersebut adalah menurut surat penepian yang membenarkan yang sama terhadap bayaran kemudahan itu bila ia sebenarnya menjadi terhutang dan perlu dibayar. Justeru, meskipun responden sebagai yang digarnis telah memberi notis bahawa wang itu dipegang oleh PP ata amanah bagi pihak perayu/pemiutang penghakiman, responden mempunyai keutamaan pertama untuk membayar hutang PP menurut kronologi kejadian dan kesan penyerahhakkan yang saksama. Pendek kata perintah garnisi nisi tidak terikat ke atas responden, kerana ia telah memperoleh hak sah ke atas akaun DT sebelum penghakiman Singapura 30 Ogos 2002 (lihat perenggan 59–62).

(3) **(oleh Suriyadi HMP, majoriti)** Mahkamah Rayuan telah sewajarnya memutuskan bahawa responden tiada kewajipan untuk campur tangan dalam permohonan PP kerana pertikaian adalah antara perayu dan PP dan ia berasaskan penghakiman Singapura, dalam kes di mana responden bukan pihak. Lebih penting lagi, responden tidak pernah diberitahu pada setiap masa matan bahawa ia perlu memegang wang dalam akaun DT atas amanah bagi pihak perayu. Dalam apa-apa kes, isu atau kausa tindakan antara perayu dan responden adalah berbeza daripada yang dalam permohonan PP itu. Responden tidak terikat oleh keputusan prosiding PP kerana ia bukan pihak kepadanya. Juga haknya tidak dilitigasi bagi pihaknya. Selanjutnya, responden telah mengambil segala langkah perlu menurut A 49 KMT dengan mempertikaikannya semasa peringkat tunjuk sebab (lihat perenggan 68, 71–73 & 75).

(4) **(oleh Suriyadi HMP, majoriti)** Adalah tidak wajib ke atas responden, sebagai sebuah bank, untuk menentukan sumber wang yang pelanggan bawa ke dalam bank. Berikutan kes itu, tiada keterangan bahawa pada masa penepian itu responden menyedari wang dalam akaun DT itu telah dinyatakan sebagai wang amanah oleh penghakiman Singapura. Oleh demikian, ia adalah jelas bahawa responden merupakan penerima bona fide untuk nilai tanpa notis dan hak penepian responden dengan meningkatkan akaun DT tidak dapat dikalahkan (lihat perenggan 78 & 85).

(5) **(oleh Suriyadi HMP, majoriti)** Bagi tujuan perayu berjaya dalam hujah amanah konstruktif, ia perlu mengatasi nilai ambang gabungan ujian objektif dan subjektif. Ini bermaksud bahawa sebahagian daripada memutuskan sama ada responden dalam rayuan ini tidak jujur oleh

piawai biasa orang jujur dan munasabah, persoalan tambahan sama ada responden mengetahui atas ujian subjektif bahawa tindakannya adalah tidak jujur semasa meningkatkan akaun DT itu, perlu dipenuhi. Berdasarkan keterangan, khususnya kandungan surat penepian itu, secara subjektif responden mempercayai ia mempunyai hak untuk meningkatkan sekuriti dan menggunakan wang itu untuk faedahnya sendiri. Dengan beban atas perayu untuk membuktikan elemen asas, ia jelas bahawa perayu telah gagal membuktikan ujian subjektif yang bergabung itu. Atas premis itu hujah amanah konstruktif yang dikemukakan oleh perayu terhadap responden telah gagal. Oleh itu, Mahkamah Rayuan adalah betul apabila ia memutuskan bahawa garnisi itu telah berjaya menunjukkan kausa mencukupi kenapa perintah garnisi nisi tidak patut dijadikan mutlak (lihat perenggan 79–82 & 84).

(6) **(oleh Hasan Lah HMP, menentang)** Setelah mempertimbangkan fakta dan keadaan kes ini dan autoriti-autoriti ia jelas bahawa responden diestop oleh perlakuan daripada litigasi semula isu berkaitan haknya untuk penepian. Responden berpuas hati dengan pertikaiannya dengan PP tentang isu berhubung haknya untuk penepian ke atas akaun DT dan oleh itu ia terikat dengan keputusan itu. Dengan membenarkan pertikaiannya dengan PP, dan PP yang gagal dalam hujahnya, responden kemudian membantah permohonan PP untuk mengetepikan bahagian perintah garnisi nisi tentang alasan sama yang menyebabkan litigasi semula tentang isu itu dan secara berkesan memohon untuk mengakas penemuan hakim Mahkamah Tinggi melalui pintu belakang. Responden tidak patut dibenarkan membuka semula kesnya. Dengan menjawab isu pertama dalam rayuan ini secara positif ia tidak perlu mengendalikan dua isu lain yang dibentangkan oleh perayu dan menyelesaikan rayuan itu (lihat perenggan 112 & 136–138).]

Notes

For cases on constructive trust in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3025–3066.

For cases on garnishee order, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5304–5307.

Cases referred to

Agip (Africa) Ltd v Jackson and others [1990] Ch 265, Ch D (refd)

Badeley v Consolidated Bank (1888) 38 Ch D 238, CA (refd)

Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Enclosure 26) [2001] MLJU 111; [2001] AMEJ 202; [2001] 6 CLJ 213, HC (folld)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169; [2014] 3 CLJ 1, FC (refd)

Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) and another (No 2) [1969] 2 All ER 367, CA (refd)

Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals [2014] 1 MLJcon 134; [2011] 7 CLJ 909, FC (refd)
Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)
Curran v Newpark Cinemas Ltd and Others [1951] 1 All ER 295, CA (refd)
Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64; [2013] 5 CLJ 949, FC (refd)
Galbraith v Grimshaw and Baxter [1910] 1 KB 339, CA (refd)
Glegg v Bromley [1912] 3 KB 474, CA (refd)
Hall v Pritchett (1877) 3 QBD 215, QBD (refd)
Holt v Heatherfield Trust Ltd and G & T Bridgewater Ltd [1942] 1 All ER 404, KBD (refd)
Hongkong and Shanghai Banking Corporation Sdn Bhd v Goh Su Liat (Telecommunication Authority of Singapore, garnishee) [1986] 2 MLJ 86; [1984–1985] SLR 804 (refd)
Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Sdn Bhd, garnishee) [1988] 1 MLJ 434 (refd)
Kwa Ban Cheong v Kuah Boon Sek and others [2003] SGHC 132, HC (refd)
Lee Phet Boon v Hock Thai Finance Corp Bhd [1994] 2 MLJ 448, HC (refd)
Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184; [1987] CLJ (Rep) 160, SC (refd)
Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee) [1990] 1 MLJ 445, HC (refd)
Mayban Trustee Bhd v Amalan Tepat Sdn Bhd & Anor [2006] 3 MLJ 82; [2006] 5 CLJ 43, HC (refd)
Bank of Montreal v IM Krisp Foods Ltd 6 CPC (4th) 90, CA (refd)
Nadikatly Anjana v Bandi Ramakrisna (1971) 1 Audh WR 832 (refd)
Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse [1958] AC 95, PC (refd)
Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (refd)
Plunkett and another v Barclays Bank, Ltd [1936] 2 KB 107, KBD (refd)
Pyne v Kinna 11 Ir Rep CL 40 (refd)
Royal Brunei Airlines v Tan [1995] 3 All ER 97, PC (refd)
Saw Swan Kee v Sim Lim Finance (M) Berhad [1985] 1 MLJ 221, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tay Way Boon & Ors v Omar Marican Holdings Sdn Bhd & Ors [1991] 1 MLJ 122; [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202, HC (refd)
Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668; [1996] 2 CLJ 270, CA (refd)
Twinsectra Ltd v Yardley and others [2002] 2 All ER 377, HL (refd)
Wearne Brothers Malaysia Sdn Bhd v Gurdave Kaur & Anor; Baharuddin, Bernatt, Tan & Ker (as garnishees) [1982] 1 MLJ 23 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ

217; [1993] 3 CLJ 210, SC (refd)
Wytcherley v Andrews (1871) LR 2 P & D 327 (refd)
Yeo Chiang Swee v United Decorators; and in the matter of an issue ordered to be tried Shun Fah & Co and the said Yeo Chiang Swee trading as Seng Hua Sawmill Co [1933] 2 MLJ 85 (refd)

Legislation referred to

Intestate Succession Act [SG]
Reciprocal Enforcement of Judgments Act 1958
Rules of the High Court 1980 O 4 r 1, O 32 r 6, O 49, O 49 rr 1, 1(1), 1(3), 2, 3, 3(2), r 4, 4(1), 4(2), O 53 r 2(5), O 92, Forms 97, 98

Appeal from: Civil Appeal No W-03–(1M)-30–13 of 2014 (Court of Appeal, Putrajaya)

Dhinesh Bhaskaran (Denise Tan with him) (Shearn Delamore & Co) for the appellant.
Ashmadi Othman (Zuratul Akmal Zubairi and Tan Ru En with him) (Che Mokhtar & Ling) for the respondent.

Suriyadi FCJ (delivering majority judgment of the court):

[1] The RHB Bank Bhd ('the respondent') had granted housing loan and overdraft banking facilities ('the facilities') to one Mohamad Najib bin Mohamad Amin ('the JD'), and, as part of the securities, monies in six fixed deposit accounts ('the FD accounts') were pledged with the respondent in a form of a letter of set off dated 14 June 1999 ('the letter of set off').

[2] In 2000 the Malaysian International Trading Corp Sdn Bhd ('the appellant') sued the JD in the Singapore High Court in relation to a massive fraud committed by the JD against the appellant. After a full trial the appellant on 30 August 2002 obtained judgment in the sum of US$79m (about RM350m then) against the JD. The Singapore High Court also made a finding of fact that the monies held by the respondent were held on trust for the appellant. For easy reference that US$79m judgment will be referred to as the Singapore judgment.

[3] The Singapore judgment was subsequently registered by the appellant in the Kuala Lumpur High Court under the Reciprocal Enforcement of Judgments Act 1958 on 10 March 2003.

[4] The appellant being the judgment creditor ('JC'), filed an ex parte application (encl 9) naming the respondent as the garnishee, for an order that all monies owed by the respondent to the JD be garnished and used for

payment of the debt due under the Singapore judgment on 12 November 2003 pursuant to O 49 of the Rules of the High Court 1980 ('O 49 of the RHC').

[5] Without any opposition at this ex parte hearing the appellant was successful and an order to show cause (or colloquially called a garnishment order nisi) was granted on 14 January 2004.

[6] For easy reference, the respondent who is drawn into the enforcement process is referred to as the garnishee whilst the judgment creditor is interchangeably referred to as the garnishor. The garnishor here is the appellant. The judgment debtor, who is not involved in this appeal, is the above mentioned Mohamad Najib bin Mohamad Amin ('JD').

[7] The garnishment order nisi was served on the respondent on 21 January 2004, but despite that service on the respondent, in exercise of its right of set off, proceeded to uplift the FD accounts on 10 March 2004 to pay the JD's debt due to the respondent. The respondent began with the issuance of a letter of demand to the JD on 16 February 2004. The respondent also disposed the remaining charged securities of the JD. After realising the securities, only RM67,664.27 was left ie the only sum conceded by the respondent to be subject to the garnishment order nisi, eventually to be paid to the appellant in compliance with the High Court order of encl 164. With that last refund of RM67,664.27 to the JD, the latter and the respondent owed each other nothing.

[8] Naturally interested in the FD accounts, the JD in a separate action filed an action to set aside parts of the garnishment order nisi on 3 June 2004 but was dismissed on 15 November 2005 by the SAR. The JD filed an appeal but failed before Lau Bee Lan J on 20 October 2009. As far as the JD was concerned the matter ended on 20 October 2009. It is noted that in this JD's application or subsequent appeal the respondent never intervened in the proceedings.

[9] The senior assistant registrar ('the SAR') granted the garnishment order absolute ('order absolute') on 8 October 2013, though having granted to the appellant the garnishment order nisi way back on 14 January 2004.

[10] Being dissatisfied with the 8 October 2013 order absolute of the SAR, the respondent filed an appeal to the High Court. On 23 January 2014 the High Court dismissed the respondent's appeal wherein the following orders were made, namely:

(a) that the respondent's appeal against the decision of the SAR be dismissed;

(b) upon consent by the parties, interest at the rate of 4% awarded by the SAR on 8 October 2013 was set aside;

(c) the garnishee order nisi dated 14 January 2004 was made absolute; and

(d) the respondent to pay to the appellant the following, viz:

(i) RM350,447.46 (being the amount from the six fixed deposit accounts) as at 13 April 2009; and

(ii) RM64,667.27 being the surplus amount after the realisation of all the securities; and

(e) costs in the sum of RM5,000 to the appellant.

[11] The respondent successfully appealed to the Court of Appeal when on 3 October 2014 the High Court's orders were set aside.

[12] On 26 February 2015 the appellant obtained leave from us on the following questions of law, namely:

(i) whether a garnishee, whose rights to the judgment debtor's funds are being litigated in garnishment proceedings between the judgment debtor and the judgment creditor but who chooses not to participate in such proceedings, is bound by the outcome of such proceedings pursuant to the principle laid down by the Privy Council in *Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse* [1958] AC 95 and the Court of Appeal in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668; [1996] 2 CLJ 270;

(ii) (a) where a garnishee has a prospective right of set off over the judgment debtor's funds which has yet to crystallise, whether such funds can be garnished by the judgment creditor;

(b) if so, whether the garnishee is entitled to exercise its right of set off and utilise the funds for its own benefit once it is served with a garnishment order nisi;

(c) whether the applicable principle of law is that laid down in *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Sdn Bhd, garnishee)* [1988] 1 MLJ 434 or *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Enclosure 26)* [2001] MLJU 111; [2001] AMEJ 202; [2001] 6 CLJ 213 (HC);

(iii) (a) whether a garnishee with a prospective right of set off over the judgment debtor's funds, who is put on notice that the funds are held by the judgment debtor on trust for the judgment creditor, can exercise its right of set off and utilise the funds for its own benefit; and

(b) whether the banking industry constitutes an exception to the principle of constructive trust in *Agip (Africa) Ltd v Jackson and others* [1990] Ch 265?

THE APPELLANT'S SUBMISSION

[13] As regards question (i) the appellant submitted that the respondent ought to have intervened during the JD's application of setting aside the garnishment order nisi or at the stage of the JD's appeal before Lau Bee Lan J. As the respondent had failed to do so the respondent was therefore estopped from relitigating and rearguing this issue of right of set off. The gist of this principle was laid down in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668; [1996] 2 CLJ 270 and *Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse* [1958] AC 95.

[14] More on point, as far as the appellant was concerned, learned counsel for the appellant submitted that the respondent had violated the garnishment order nisi. It was never in dispute that the respondent was served on 21 January 2004 with the garnishment order nisi, the ex parte summons-in-chambers, and the supporting affidavit, which also enclosed the Singapore judgment. The appellant argued that the respondent was fully aware that the monies in the FD accounts were held on trust by the JD for the judgment creditor whilst the garnishment order nisi had frozen the monies in the FD cccounts. Notwithstanding the garnishment order nisi, the respondent willfully exercised its right of set off on 10 March 2004 pursuant to the letter of set off and uplifted the FD accounts to satisfy the JD's debts due under the facilities.

[15] The appellant contended that the respondent was duty-bound to obey the garnishment order nisi and was not permitted to deal with the monies in the FD accounts, as provided for under O 49 r 3(2) of the RHC.

[16] In support of its stance the appellant referred to the case of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210 where at p 220 (MLJ); 212 (CLJ) it was held that:

> a person against whom an order of court has been issued is duty bound to obey that order until it is set aside.

[17] Learned counsel for the appellant also submitted on the issue of constructive trusteeship, contending that the monies in the FD accounts were held on trust for the appellant. He argued that the moment the respondent knew that the Singapore court had declared the monies were being held by the

JD for the judgment creditor, the respondent thus assumed the role of a trustee. It was therefore not at liberty to exercise its right of set off and utilise the monies for its own benefit.

[18] The appellant was lent further support by the case of *Agip (Africa) Ltd v Jackson and others* [1990] Ch 265, where at p 291 it was remarked:

> ... if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property ... from the time he acquired notice.

[19] Regretfully here, the appellant argued, the Court of Appeal completely failed to consider the respondent's knowledge of the trust and the ownership of the monies in the FD accounts being subject to the garnishment order nisi and the principles of constructive trusts, as laid down in *Agip (Africa) Ltd v Jackson*.

THE RESPONDENT'S SUBMISSION

[20] In reply learned counsel for the respondent submitted that the High Court's decision by Lau Bee Lan J on the JD's application against the JC could not bind the respondent regardless of whether the respondent had chosen to participate or otherwise.

[21] It was submitted that the cases of *Tradium* and *Nana Ofori* could not be applied to the current case as the JD's application was a separate proceeding unrelated to the issue or cause of action between the appellant and the respondent, as acknowledged by the Court of Appeal on 3 October 2014 in its judgment.

[22] Learned counsel for the respondent also submitted that the respondent at all material time was unaware of the subsequent events of the JD's application as the respondent was not privy to it. The JD's application involved different parties for different consideration.

[23] More importantly, the JD's application did not fully ventilate or adjudicate the issue of the respondent's right to set off the FD accounts. Therefore, the JD's application did not affect or abdicate the rights of the respondent as provided for under O 49 of the RHC.

[24] The respondent submitted that its right to uplift the FD accounts derived from the letter of set off, had accrued long before the Singapore judgment was entered against the JD. It was also contractually stated that the JD had no right to freely deal with the monies in the FD accounts, being a

security for the facilities granted by the respondent. It was argued that no garnishee order could have been made against the respondent for those monies.

[25] The respondent also ventilated that notwithstanding any notice of the Singapore judgment, the respondent had obtained legal and equitable rights over the FD accounts as early as 14 June 1999.

[26] Additional to the argument at para 25 ie on the issue of the respondent having acquired equitable rights over the FD accounts, the respondent submitted that the case of *Binamin MJC Quarry* was more relevant than *Kedah Kelang Papan Sdn Bhd*. Learned counsel for the respondent strongly argued that evidentially there was no debt due by the respondent to the JD at the time when the respondent was served with the garnishment order nisi. The JD could not yet claim ownership or demand the return of the monies in the FD accounts. Those accounts had been pledged to the respondent as security for the facilities which were still 'alive' and functional.

[27] The principle of constructive trust was inapplicable here, as the respondent did not fall within any of the categories of a constructive trustee as laid down in *Agip*.

[28] To sum it up, the respondent argued that it was therefore justified in exercising its legal right of set off.

BACKGROUND DISCUSSION

[29] As parties have alluded to O 49 of the RHC it is important to reproduce r 1 of this order. It reads:

> Where a person (who is referred to as 'the judgment creditor') has obtained a judgment or order for the payment by some other person (who is referred to as 'the judgment debtor') of money, not being a judgment or order for payment of money into Court, and any other person within jurisdiction (in this Order referred to as 'the garnishee') is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of *any debt due or accruing due* to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order or order and the costs of the garnishee proceedings. (Emphasis added.)

[30] In a nutshell, O 49 r 1 of the RHC entitles a successful judgment creditor to enforce a money judgment, and may require a third party who owes the JD, to pay to the judgment creditor the amount of debt due or accruing to the judgment debtor. This provision enables a judgment creditor to have the benefit of any debt owed by a third person (a 'stranger') to the judgment debtor

to be assigned to the judgment creditor (*Dictionary of Law* (4th Ed) LB Curzon, Barrister; Manitoba Law Reform Commission December 2005 at p 1). A

[31] In order to take advantage of O 49 of the RHC the judgment creditor must have obtained a money judgment or order against a judgment debtor ie of a decision given by a court of law or other competent tribunal, as a result of a legal proceeding therein. A judgment or order on the other hand does not include a judgment or order for the payment of money into court. B

[32] The judgment creditor then identifies a third party ie the potential garnishee who is indebted to the judgment debtor. That debt must relate to *any debt due or accruing due* to the judgment debtor. Thereafter the judgment creditor initiates the garnishment proceedings for the purpose of reaching the property of the JD held or owed by that third party. C D

[33] Procedurally, garnishee proceedings begins with the filing of an ex parte notice of application, supported by an affidavit in Form 98 (O 49 r 2). The affidavit will identify the judgment or order to be enforced, the amount remaining unpaid under the judgment or order at the time of the application, with the garnishee identified, and the applicant stating his belief that the garnishee is within the jurisdiction and is indebted to the judgment debtor. E

[34] At this stage, the burden is on the garnishor, but without any opposition facing it, the latter invariably succeeds. As said earlier at para 5 an order successfully obtained pursuant to this ex parte application order will be in Form 97 and is an order to show cause (garnishment order nisi). F

[35] Despite the garnishment order nisi not being an absolute order, O 49 r 3(2) legislates that this order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in it (*Wearne Brothers Malaysia Sdn Bhd v Gurdave Kaur & Anor; Baharuddin, Bernatt, Tan & Ker (as garnishees)* [1982] 1 MLJ 23). Generally, once the garnishee is served with the order, the debt is charged, and he '... cannot pay the debt to anybody but the garnishor without incurring the risk of having to pay it all over again' (*Galbraith v Grimshaw and Baxter* [1910] 1 KB 339; *Nadikatly Anjana v Bandi Ramakrisna* (1971) 1 Audh WR 832). This provision is the mainstay of the appellant's case. G H

[36] To make it absolute O 49 r 4(1) of the RHC, which must be read together with O 49 r 3 of the RHC, must first be complied with. For purposes of this second stage ie in order to obtain the order absolute, the garnishment order nisi must first be served personally on the garnishee and also on the judgment debtor, unless directed otherwise. A return date is given, seven days I

after service, whereupon the garnishee attends a hearing in order to show cause, why he should not pay the judgment creditor the debt due from him to the judgment debtor. At the conclusion of the hearing the garnishment order nisi is either made absolute or not.

[37] In order to obtain a garnishment order nisi or an order absolute, the court must be convinced that the debt of the garnishee to the JD must relate to any debt due or accruing due to the judgment debtor. 'Any debt due or accruing due' is not exactly easy to understand, and as Jackson J in *Bank of Montreal v IM Krisp Foods Ltd* 6 CPC (4th) 90 (CA) said:

> Few phrases have been as problematic to define as 'debt due or accruing due'. The S*horter Oxford English Dictionary*, (3rd Ed) defines 'accruing' as 'arising in due course', but an examination of English and Canadian authority reveals that not all debts 'arising in due course' are permitted to be garnished ...

[38] What is clear here is that 'any debt due or accruing due' to the judgment debtor by the garnishee includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured, notwithstanding any restriction as to the mode of withdrawal (O 49 r 1(3)). For purposes of this appeal, without a need for a detailed discussion, the FD accounts under discussion are definitely a deposit account with a bank (in this case, the respondent) within the meaning of this rule.

ANALYSIS

[39] Jurisdictionally, a court under O 32 r 6 of the RHC or under O 92 of the RHC, may set aside any ex parte order. In *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445 at pp 446–447, VC George J held that the court could even set aside an ex parte final order pursuant to O 32 r 6 of the RHC. This provision has general application to general applications and proceedings in chambers, and unless there were specific rules elsewhere that do away with the said rules of general application, it was applicable in an ex parte garnishment proceedings. In fact VC George J had no hesitation in holding that even if O 32 r 6 were inapplicable the court still was equipped with inherent jurisdiction to prevent injustice. See also *Hongkong and Shanghai Banking Corporation Sdn Bhd v Goh Su Liat (Telecommunication Authority of Singapore, garnishee)* [1986] 2 MLJ 86; [1984–1985] SLR 804 and *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448.

[40] The incompleteness of a garnishment order nisi or rule nisi (from Latin nisi, meaning 'unless'), though a court order, is reflected in O 49 r 4(2) of the RHC. Under this provision the effect of a completed order (or order absolute) is clearly reflected. It reads:

An order absolute under rule 1 against the garnishee may be enforced in the same manner as any other order for the payment of money.

[41] Recognition is thus given to an order absolute and unless further action is taken, as clarified by VC George, the garnishment order nisi is susceptible to being set aside. Order 49 r 4 of the RHC empowers the court on further consideration of the matter, to refuse or allow the ex parte order to be made absolute. This provision reads:

4(1) Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the Court may, subject to rule 7, make an order absolute in one of the forms in Form 99 under rule 1 against the garnishee.

[42] Due to the ex parte nature of the garnishment order nisi, when served on the respondent on 21 January 2004 the appellant agreed that the respondent had a right to set off the FD accounts subject to the respondent successfully showing cause why the order should not be absolute. This is seen at para 54 where the appellant conceded the following:

RHB Bank therefore ought to have respected the Garnishee Order Nisi, and had no right to set-off the amounts in the Accounts, *unless* and until the Garnishee Order Nisi was set aside or RHB s*uccessfully showed cause why the order should not be absolute.* (Emphasis added.)

[43] By the concession above, as reflected in the italicised portion, the appellant recognised the garnishee's right of set off if it successfully showed cause why the order should not be made absolute. Therefore, if the order absolute is not granted by the court, regardless of having ignored the garnishment order nisi, the respondent will escape any retribution for lifting the FD accounts. No doubt if the appellant is successful then the end result might not be the same.

[44] I likewise see no reason to disagree with the concession made by the appellant.

[45] The question that must follow is:

Could the garnishee in the circumstances of the case successfully prevent the Garnishment Order Nisi from being made absolute hence justifying the lifting of the FD Accounts despite being served with it?

[46] My answer to this question is in the positive.

[47] Before supplying the reasons for my positive answer, a need arises for me to make mention of the approach undertaken by the appellant in this appeal

first. The antecedent shows that the appellant at the SAR stage had successfully obtained a garnishment order absolute ('order absolute') and subsequently affirmed by the High Court on 23 January 2014. That success was short lived as the Court of Appeal on 3 October 2014 overturned the High Court's decision. Had the appellant not pursued the matter before us, the issue of the uplifting of the FD accounts would have become academic and a stale issue.

[48] Before us, instead of focusing on the law and the available evidence demanding that the order absolute should not have been set aside, the appellant had taken the unorthodox approach of attacking the disrespectful behavior of the respondent. In a word, the appellant was attempting to persuade the court that if it succeeds in convincing us that the respondent had shown no deference to a court order when brushing aside the garnishment order nisi, an order absolute therefore must automatically follow.

[49] I find this submission rather unpalatable, as, not only did two unsuspecting contracting parties not foresee an outsider one day steamrolling over the priority rights of a creditor of the JD, but was also bound by the draconian and pervasive effect of a garnishment order nisi. The garnishment order nisi was served on the respondent on 21 January 2004 whilst the order absolute was given by the SAR on 23 January 2013 and affirmed by the High Court on 23 January 2014. The Court of Appeal overturned the 23 January 2014 order only on 3 October 2014 ie about ten years and nine months from the date of the garnishment order nisi! Whether it was due to the nonchalant attitude of the appellant or due to some technical glitch, perusing the chronology of events, had the respondent not have reasons to set off the FD accounts, a serious injustice could have befallen it.

[50] Procedurally, surely that cavalier behavior of the respondent must be reserved for another and separate proceedings and not to be intertwined with the factual matter before us? Whether the appellant will succeed in influencing us to bear upon the respondent swift retribution for ignoring the garnishment order nisi depends very much on whether the appellant succeeds in obtaining an order absolute ie by winning this appeal first. By no account was this distracting course of action helpful to the appellant.

[51] I now discuss the merits of this appeal. Without beating around the proverbial bush I ask myself these two pertinent questions, namely:

(a) was the letter of set off an equitable assignment and if so what was the effect; and

(b) was there any debt due and debt accruing due to the JD from the respondent at the time when the ex parte garnishee application, which culminated in the garnishment order nisi was heard, and later served on the respondent?

Was the letter of set off an equitable assignment and if so what was the effect?

[52] To entitle a garnishor to enter judgment against a garnishee the garnishor must at the outset establish that the money sought to be attached belongs to the JD. In *Badeley v Consolidated Bank* (1888) 38 Ch D 238, it was held that ' a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons'.

[53] In *Plunkett and another v Barclays Bank, Ltd* [1936] 2 KB 107 judgment could not be entered to attach the money as it was actually trust money ie not of the JD. And if the debt due has been assigned, the alleged assignee must be given an opportunity to be heard (*Curran v Newpark Cinemas Ltd and Others* [1951] 1 All ER 295).

[54] Back home in Malaysia, in *Tay Way Boon & Ors v Omar Marican Holdings Sdn Bhd & Ors* [1991] 1 MLJ 122; [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202, it was likewise held that a garnishee could not attach a debt that had been equitably assigned. Similarly, a judgment creditor was not entitled to garnish monies which the JD had parted with his interest, prior to the date of the garnishment notice (see *Yeo Chiang Swee v United Decorators; and in the matter of an issue ordered to be tried Shun Fah & Co and the said Yeo Chiang Swee trading as Seng Hua Sawmill Co* [1933] 2 MLJ 85 and *Holt v Heatherfield Trust Ltd and G & T Bridgewater Ltd* [1942] 1 All ER 404).

[55] In *Glegg v Bromley* [1912] 3 KB 474 it was clarified that, 'first, that the assignment was made for good consideration, and that assignment was not an assignment of a mere expectancy, or of a cause of action, but was an assignment of property, that is, of the fruits of an action as and when recovered, and that it was consequently not void under 13 Eliz c.5'.

[56] In the case before us, perusing the letter of set off, it is abundantly clear that the assignment of the FD accounts by the JD to the respondent was made for good consideration as a security for the facilities. The respondent was entitled to withhold the FD accounts, and contractually permitted to exercise its right of set off in the event the JD failed to regularise his accounts.

[57] Every case has its peculiar set of facts, and whether the garnishee has priority over a third party, depends very much on the available facts. In *Tay Way*

Boon & Ors v Omar Marican Holdings Sdn Bhd & Ors [1991] 1 MLJ 122; [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202, subject to the set of facts there, Mohamed Dzaiddin J (as he then was) recognised that a garnishee order could only attach debts which the debtor himself was free to deal with. The court there remarked:

> The debtor himself is bound by an equitable assignment which is independent of the giving of notice. The garnishor, therefore, cannot attach a debt which has been equitably assigned, or in other words, the equitable assignee has priority over the person serving the garnishee order.

[58] In the appeal before us the facts showed that the respondent had obtained an equitable right much earlier than the service of the garnishee order and thus could not be denied its legal and contractual right to set off and utilise the funds in the FD accounts.

[59] The respondent too had done the needful before setting off the FD accounts, by serving the letter of demand dated 16 February 2004 on the JD, on the premise that the latter had defaulted in the repayment of the facilities (p 370 Vol 4/5). The reason for the issuance of the letter of demand on the JD was never disputed. The set off therefore was in accordance with the letter of set off (see cl 4) which allowed the same towards satisfaction of the facilities when they actually became due and payable. If I may add, there was nothing to stop the respondent from calling the facilities pursuant to cl 7(h) of the letter of offer for the housing loan. The default clause reads as follows:

> 7 Events of default
>
> All monies outstanding under the banking facility ... shall become immediately repayable by you upon demand being made ... upon the occurrence of any of the following events:
>
> a ...;
>
> h ... if legal proceedings suits or actions of any kind whatsoever (civil or criminal) ...

[60] Further, under item illegality of a clause in the letter of offer of the overdraft facilities dated 10 June 1999 it was stated 'where ... any ... order ... makes it apparent ... that it is ... impractical without breaching such ... order ...for us to maintain, fund or give effect to our obligation hereunder, we shall not then be liable or obliged to make available the facilities'.

[61] Here, the court proceedings in Singapore or the garnishment order nisi would fall squarely within the ambit of the above clauses thus enabling the respondent to demand repayment and thenceforth set off the FD accounts.

[62] Even though the respondent as a garnishee was put on notice that the funds were held by the JD on trust for the judgment creditor, the respondent had first priority to satisfy the JD's debt by virtue of the chronology of events and the effect of the equitable assignment. More of this issue when discussing the constructive trustee argument. In short the garnishment order nisi was not binding on the respondent as it had obtained legal rights over the FD accounts way back on 14 June 1999 ie before the Singapore judgment of 30 August 2002.

Was there any debt due and debt accruing due to the JD from the respondent at the time when the ex parte garnishee application, which culminated in the garnishment order nisi was heard, and later served on the respondent?

[63] For easy reference I will call the initial proceedings as the ex parte hearing whilst the proceedings when the garnishment order nisi will be made absolute or not, as the inter partes hearing. At that inter partes proceedings there will be 'further consideration of the matter', with the 'matter' being the application heard at the ex parte hearing under O 49 r 1. So, could the respondent succeed in convincing the court at the inter partes hearing that at the time when the garnishment order nisi was granted there was no actionable debt pending? In other words the respondent could not yet uplift the FD accounts as it was not yet due and payable to the JD. The JD was still then using the facilities. In simple language, at the ex parte garnishee application stage, and at the time when the garnishee was served with the garnishment order nisi, there was no 'debt due or accruing due' to the JD.

[64] I now refer to some authorities on the crucial words in O 49 r 1(1) of the RHC viz 'debt due or accruing due' to the judgment debtor. In *Kedah Kelang Papan*, a case relied upon by the appellant, the sum to be garnished was the retention sum in a construction contract. It was held that no garnishee order may be made unless some person at the time of the order was made was indebted to the judgment debtor. Therefore if there was a debt in presenti an order could certainly be made to attach the debt. If there was no debt in presenti but a debitum in presenti existed though payable in the future, such an order could still be made with regard to the debt, whether legal or equitable This case was approved by *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357.

[65] In *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Enclosure 26)* [2001] MLJU 111; [2001] AMEJ 202; [2001] 6 CLJ 213, a case which took a contrary stand to *Kedah Kelang Papan*, and of which I am in full agreement, the issue before the court was also in relation to a retention sum. The debt claimed by Binamin was the retention sum withheld by the garnishee

(TSR). In support of its right *Binamin* cited *Kedah Kelang Papan*. The SAR made an order attaching all debts due or accruing from the garnishee (TSR) to the JD (Way Soon) to satisfy the judgment sum obtained by the judgment creditor (Binamin MJC Quarry Sdn Bhd). TSR appealed before Abdul Aziz Mohamad J arguing that as the retention sum was not due and payable, Binamin (JC) had no right to it. TSR also argued that as it was entitled to withhold the retention sum, it was thus not 'a debt due or accruing due' to Way Soon (JD) pursuant to O 49 r 1 of the RHC. The High Court held the view that Binamin (JC) should not have a greater right to the payment of the debt than Way Soon (JD) as it would not be entitled to claim the debt before it became due and payable. In short the retention sum was not a debt due and accruing from TSR to Way Soon. As time would be a factor on the outcome of the retention sum no part of the retention should be ordered paid to Binamin. The appeal was allowed and the SAR's order was set aside.

[66] In *Saw Swan Kee v Sim Lim Finance (M) Berhad* [1985] 1 MLJ 221 there was no crystallised actionable debt against the developer judgment debtor by the garnishee. The garnishee therefore could not take the money to set off secured and non-actionable debts. Had there been an actionable debt the garnishee there could set off the RM25,000 but not in the circumstances of the case. Pursuant to the facts in that case the garnishor was entitled to garnish the money (RM25,000) held by the garnishee. An absolute order therefore could be given (see also *Pyne v Kinna* 11 Ir Rep CL 40).

[67] In *Hall v Pritchett* (1877) 3 QBD 215, on the date when the attachment order was made, it was discovered that the judgement debtor had not completed his works, and hence no payment was payable to him. That being so, no debts existed, either payable or to be accrued to the judgement debtor.

[68] From the above cases, the common thread is that a debt due and payable to the JD must exist on the day the garnishee application was filed, in order to obtain the garnishment order nisi.

[69] As it were in this case, when the garnishment application was filed at the ex parte stage, the pre-condition of a 'debt due or accruing due' to the judgment debtor was non-existent. There was no actionable 'debt due or accruing due' to the JD. The facilities were still running smoothly. The respondent would only be having a debt due to the JD upon the termination of the facilities and the securities, either wholly or partially (ie balance after settling any sums due) to be returned to the JD.

[70] For completeness, in the circumstances of the case too, the garnishor could not have attached the so called debt as it had been equitably assigned to the garnishee.

Whether the respondent could be defaulted for not intervening in the JD's application

[71] I agree with the findings of the Court of Appeal that the issue between the appellant and the respondent was premised on the letter of set off and was not concerned with whether the JD held the garnished accounts on trust for the appellant. The Court of Appeal rightfully held that the respondent had no duty to intervene in the JD's application as the dispute was between the appellant and the JD and it was premised on the Singapore judgment, in a case in which the respondent was not a party.

[72] I find no evidence before me to indicate that the respondent was aware that the monies in the FD accounts were from bribes and had been obtained fraudulently by the JD. More importantly, the respondent was never informed at all material times that the respondent was to hold monies in the FD accounts on trust for the appellant.

[73] I also observe that the issue or cause of action between the appellant and the respondent was different from that in the JD's application. The respondent was not bound by the outcome of the JD's proceedings as it was not a party to it. Neither were its rights litigated on its behalf.

[74] The nail that sealed the appellant's contention that the garnishee should have intervened into the JD's application to set aside the garnishee order to show cause is the chronology of events. The uplifting of the FD accounts was on 10 March 2004 whilst the JD's application was on 3 June 2004. In other words, vis a vis the JD, by 3 June 2004 the matter was academic as far as the garnishee was concerned.

[75] Finally, I agree with the Court of Appeal that the learned judge at the court below had placed undue importance on the Singapore judgment, bearing in mind that it was a suit that was commenced by the appellant against the JD. The Singapore judgment came into the picture only when the respondent was served with the cause papers of encl 9 on 21 January 2004. The respondent thereafter had rightfully filed an affidavit to oppose encl 9 what with there being no money left to garnish. The respondent even went a step further by filing the appeal to the High Court when the garnishment order nisi was made absolute. In short, the respondent had taken all necessary steps in accordance with O 49 by disputing it during the show cause stage.

Whether the banking industry constitutes as exception to the principle of constructive trust in Agip (Africa) Ltd v Jackson and others?

[76] In *Agip*'s case, it was held as follows:

> The first is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property, and in the second as from the time he acquired notice.

[77] The appellant submitted that as the monies in the FD accounts were expressly declared trust monies for the appellant by the Singapore High Court, the respondent invariably held the monies as a constructive trustee for the appellant. It was therefore not at liberty to exercise its right of set off and utilise the said trust monies for its own benefit.

[78] It is pertinent to point out that it is not incumbent on the respondent, as a bank, to ascertain the source of monies which customers bring into the bank (see *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134 at p 142 ; [2011] 7 CLJ 909 at p 920). Here, there is no evidence that at the time of the set off the respondent was aware that the monies in the FD accounts were declared as trust monies by the Singapore judgment, let alone was it aware that the said monies were from bribes. I therefore make a finding that the respondent was a bona fide recipient for value without notice.

[79] I now touch on the constructive trust argument put forth by the appellant. A constructive trust arises by operation of law, whenever the circumstances are such that it is unconscionable for a party to assert beneficial rights over property, and in the course of it denying the beneficial interest of another (see *Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381; *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64; [2013] 5 CLJ 949).

[80] That was the basic principle alluded to prior to the development of the law of constructive trust whenever parties asserted the existence of a constructive trust. In sequence, *Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) and another (No 2)* [1969] 2 All ER 367 and *Royal Brunei Airlines v Tan* [1995] 3 All ER 97 started the development and was eventually extended to *Twinsectra Ltd v Yardley and others* [2002] 2 All ER 377. The new approach saw the introduction of a two-fold test of an objective and subjective test. This test which demands the additional subjective honesty ingredient was approved by *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169; [2014] 3 CLJ 1.

[81] In a gist apart from deciding whether the respondent in the current appeal was dishonest by the ordinary standards of reasonable and honest people, the additional question of whether the respondent knew on a subjective test that its act was dishonest when uplifting the FD accounts, has to be satisfied. For the appellant to succeed on the constructive trust argument, it must therefore overcome the threshold of the combined objective and subjective tests.

[82] From the evidence discussed comprehensively above, in particular the contents of the letter of set off, subjectively the respondent believed that it had a right to uplift the securities and utilise the monies for its own benefit. With the burden on the appellant to establish the basic ingredients, I am satisfied that the appellant has failed to establish that conjoined subjective test. On that premise the constructive trust argument posed by the appellant against the respondent must fail.

CONCLUSION

[83] The garnishee here has ignored a court order ie the garnishment order nisi and had exposed itself to the potential retribution of the court unless it succeeds in denying an order absolute to the appellant. I am satisfied that the respondent has successfully done this. In fact the respondent had done this earlier at the Court of Appeal stage when it set aside the order absolute meted down by the High Court.

[84] Having appraised the law and the evidence before me, I am satisfied that the Court of Appeal was right when it decided that the garnishee had successfully shown sufficient cause why the garnishment order nisi should not be made absolute. My reasoning may be split into two, namely:

(a) once the FD accounts were equitably assigned to the respondent, all rights of the JD over them had been taken away. The moment the JD was deprived of any rights over the FD accounts/debt the garnishor thus could not demand a non-existent debt to be attached; and

(b) at the stage when the court granted the garnishment order nisi, and later served on the respondent, there was no debt due or accruing due to the JD, as he was still making payment. In a word the facilities were still subsisting and nothing was due yet to the JD. This finding depends very much on a finding of fact. I have no reason to disagree with the factual finding of the Court of Appeal.

[85] I therefore find sufficient substance in the submission of learned counsel for the respondent that the appellant could not garnish the FD accounts just on the above two grounds. That being so, by no account could an order absolute

have been meted down by any court at that inter-parte hearing. As the appellant failed to convert the garnishment order nisi to an order absolute, I therefore hold the view that the respondent's right of set off by uplifting the FD accounts could not be defeated.

[86] My learned brother Azahar Mohamed FCJ and my learned sister Zaharah Ibrahim FCJ have read this majority judgment in draft and have expressed their agreement with it.

[87] For the above reasons I dismiss the appeal with costs.

[88] Due to the set of facts of this appeal my answers to the questions of law granted by us are as follows:

(a) question (i) is answered in the negative;

(b) question (ii)(a) is answered in the negative;

(c) question (ii)(b) is answered in the positive;

(d) question (ii)(c) is answered as follows – the case of *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Enclosure 26)* [2001] MLJU 111; [2001] AMEJ 202; [2001] 6 CLJ 213 (HC) is preferred;

(e) question (iii)(a) is answered in the positive; and

(f) I find no necessity in answering question (iii)(b) in the circumstances of the case as the law of constructive trust has developed past that of *Agip*.

[89] Costs of RM20,000 are ordered. The deposit is refunded to the appellant.

Hasan Lah FCJ (delivering dissenting judgment of the court):

INTRODUCTION

[90] The appellant had filed this appeal against the decision of the Court of Appeal given on 3 October 2014 which allowed the respondent's appeal and reversed the High Court's decision given on 23 January 2014 that the respondent as garnishee had to pay the appellant the amount of RM350,447.46 in Mohamad Najib bin Mohamad Amin's ('judgment debtor') six fixed deposit accounts as at 13 April 2009 and RM67,664.27 being the surplus arising from the foreclosure of the judgement debtor's properties assigned and held by the respondent.

[91] This appeal therefore involves issues that arose out of garnishee proceedings commenced by the appellant against the respondent in respect of monies held by the respondent in the six fixed deposit accounts of the judgment debtor.

[92] On 26 February 2015 leave was granted to the appellant by this court to appeal against the decision of the Court of Appeal on the following questions of law:

> (1) Whether a Garnishee, whose rights to the Judgment Debtor's funds are being litigated in garnishment proceedings between the Judgment Debtor and the Judgment Creditor but who chooses not to participate in such proceedings, is bound by the outcome of such proceedings pursuant to the principle laid down by the Privy Council in *Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse* [1958] AC 95 and the Court of Appeal in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668; [1996] 2 CLJ 270?
>
> (2) (a) Where a Garnishee has a prospective right of set off over the Judgment Debtor's funds which has yet to crystallize, whether such funds can be garnished by the judgment Creditor?
>
> (b) If so, whether the Garnishee is entitled to exercise its right of set off and utilise the funds for its own benefit once it is served with a Garnishee Order Nisi?
>
> (c) Whether the applicable principle of law is that laid down in *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd Teknibina Advisory Services Sdn Bhd, Garnishee)* [1988] 1 MLJ 434 or *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd* [2001] 6 CLJ 213?
>
> (3) (a) Whether a Garnishee with a prospective right of set- off over the Judgment Debtor's funds, who is put on notice that the funds are held by the Judgment Debtor on trust for the Judgment Creditor, can exercise its right of set off and utilise the funds for its own benefit?
>
> (b) Whether the banking industry constitutes an exception to the principle of constructive trusts in *Agip (Afrika) Ltd v Jackson and Others* [1990] 1 Ch 265?

BACKGROUND FACTS

[93] The background facts of the case had been sufficiently set out by the Court of Appeal in its judgment. For the purpose of this judgment I will reproduce the facts of the case as found by the Court of Appeal which are relevant for the purpose of this appeal.

[94] The respondent had granted banking facilities to the judgment debtor and as part of securities, the judgment debtor's monies in six fixed deposit accounts were pledged with the respondent. The pledge was in a form of a letter of set off dated 14 June 1999.

[95] Sometimes in 2000, the appellant sued the judgment debtor and 29 others in the Singapore High Court relating to a massive fraud perpetrated by the judgment debtor and other defendants on the appellant. The appellant, after a full trial on 30 August 2002, obtained judgment in the sum of US$79m against the judgment debtor ('Singapore judgment'). The Singapore High Court found as a matter of fact that the judgment debtor was instrumental in the fraud and had accepted bribes of at least US$1.2m from third parties. Those bribes had been mainly deposited in the judgment debtor's accounts in Kuala Lumpur.

[96] The Singapore High Court had also found that the monies in the six fixed deposit accounts were held by the judgment debtor on trust for the appellant.

[97] There is no dispute by the respondent that the Singapore judgment referred to and encompassed the six fixed deposit accounts with the respondent and as at 11 March 2004, the monies in the same were in the sum of RM350,447.46.

[98] The Singapore judgment was registered by the appellant on 10 February 2003 in the Kuala Lumpur High Court under the Reciprocal Enforcement of Judgments Act 1958.

[99] On 12 March 2003, the appellant filed an ex parte application (encl 9) naming the respondent as a garnishee for an order that all monies owed by the respondent to the judgment debtor be garnished and be used for payment of the debt due under the Singapore judgment. The aforesaid application was granted in terms on 14 January 2004. The appellant also commenced garnishee proceedings against eight other parties.

[100] The 14 January 2004 ex parte garnishee order to show cause was served on the respondent together with the supporting affidavit of that application which contained the Singapore judgment on 21 January 2004. Hence, the respondent was fully aware of that judgment from that date.

[101] On 10 March 2004, the respondent proceeded to uplift the six fixed deposit accounts and utilise the same to pay off the judgment debtor's debt due to the respondent. The respondent had also sold the other charged securities of

the judgment debtor and after realising the same, there was a surplus balance of RM67,664.27 which the respondent contended that this was the only amount subject to garnishment.

[102] On 3 June 2004 the judgement debtor filed an application to set aside five of the nine garnishee orders to show cause which included the order against the respondent. On 15 November 2005, the senior assistant registrar dismissed the judgment debtor's application with costs. The judgment debtor's appeal against the senior assistant registrar's decision was dismissed by Lau Bee Lan J on 20 October 2009. The judgment debtor appealed to the Court of Appeal against Lau Bee Lan J's decision but withdrew the appeal on 15 February 2012.

[103] Enclosure 9 was finally heard by the senior assistant registrar on 8 October 2013 wherein she found in favour of the appellant resulting in a garnishee order absolute in terms of the application in encl 9.

[104] The respondent then appealed to the High Court wherein the learned judge on 22 October 2013 dismissed the same and the following orders were made:

(a) the respondent's appeal against the decision of the senior assistant registrar was dismissed;

(b) upon consent by the parties, interest at the rate of 4% awarded by the senior assistant registrar was set aside;

(c) the garnishee order nisi dated 14 January be made absolute; and

(d) the respondent pay to the appellant the followings:

(i) RM350,447.46 (being the amount from the six fixed deposit accounts set off by the judgment debtor) as at 13 April 2009;

(ii) RM64,667.27 being the surplus amount after the realisation of all the securities; and

(iii) costs in the sum of RM5,000 to the appellant.

DECISION OF HIGH COURT

[105] The learned judge firstly held that the respondent, after having full knowledge of the Singapore judgment which had been registered in the Kuala Lumpur High Court, could not on 10 March 2004 exercise a set off to pay off the judgment debtor's overdraft. Secondly, it was held that the respondent held the monies as constructive trustee for the appellant and was legally obliged to return the monies to the appellant.

DECISION OF COURT OF APPEAL

[106] In reversing the decision of the High Court, the Court of Appeal held that the respondent had no duty to intervene in the judgment debtor's application before the senior assistant registrar on 15 November 2005 and appeal before Lau Bee Lan J as the dispute there was between the appellant and the judgment debtor and was premised on the Singapore judgment which the respondent was not a party. Secondly, the issue or cause of action between the appellant and the respondent was different as it was premised on the letter of set off and did not concern as to whether the judgment debtor held the garnished accounts on trust for the appellant. Accordingly the Court of Appeal held that the principle of res judicata did not apply against the respondent.

[107] The Court of Appeal also held that the respondent was not bound by the Singapore judgment that the monies in the six fixed deposit accounts were tainted with illegality because the respondent was not a party to the Singapore suit and secondly there was no evidence to show that the respondent was aware that the monies in the six fixed deposit accounts were from bribes and obtained fraudulently by the judgment debtor. In the Court of Appeal's view the respondent was a bona fide recipient for value without notice and its rights to the monies in the six fixed deposit accounts could not be affected by illegal conduct.

[108] The Court of Appeal also held that the judgment debtor had no claim on the monies in the six fixed deposit accounts until the secured amount had been fully paid. As such, when the appellant stepped into the judgment debtor's shoes, it too had no claim on the monies. On the two High Court cases cited to the court namely, *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Sdn Bhd, garnishee)* [1988] 1 MLJ 434 and *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Enclosure 26)* [2001] MLJU 111; [2001] AMEJ 202; [2001] 6 CLJ 213 (HC), the Court of Appeal agreed with the decision in *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd* that the retention sum in a construction contract could not be garnished as the retention sum was subject to a 'a clean bill of health' in respect of defects in the construction.

THE APPEAL

[109] In his submission learned counsel for the appellant raised three grounds as to why the decision of the Court of Appeal cannot be sustained. Firstly, it was argued that the respondent was bound by the decision of Lau Bee Lan J given on 20 October 2009 as the key issue in encl 9 and the judgment debtor's application to set aside the garnishee order to show cause was the same.

[110] Secondly, it was argued that the respondent's right of set off had not yet crystallised. The respondent only exercised its right of set off after being notified of the garnishee order to show cause and the appellant's rights over the monies in the six fixed deposit accounts. The respondent was therefore under the obligation to obey the garnishee order to show cause.

[111] Thirdly, it was argued that the monies in the six fixed deposit accounts were held on trust for the appellant. From the moment the respondent knew that the Singapore court had declared the monies in the six fixed deposit accounts as being held on trust by the judgment debtor for the appellant the respondent held the monies as constructive trustee for the appellant and was not at liberty to exercise its right of set off and utilise the monies for its own benefit. In support of that proposition learned counsel for the appellant cited the views expressed at paras 3.4260 and 3.4280 in the *Law Relating to Banker and Customer in Australia*, 1975 and the decision of the English Court of Appeal in *Agip (Africa) Ltd v Jackson and others* [1990] Ch 265.

ESTOPPEL

[112] The issue of estoppel as submitted by learned counsel for the appellant is more relevant to the first question of law posed in this appeal.

[113] Learned counsel for the appellant submitted that the key issue in encl 9 and the judgment debtor's application in relation to the respondent was, whether the respondent was entitled to exercise a right of set off over the monies in the six fixed deposit accounts.

[114] Learned counsel for the appellant further submitted that the respondent was fully aware of the judgment debtor's application and the judgment debtor's appeal before Lau Bee Lan J, but was content to let this specific issue be litigated and argued by the judgment debtor. The respondent took no steps to intervene in those proceedings, and was content to allow Lau Bee Lan J to decide this issue. The garnishee absolute proceedings against the respondent were even adjourned pending the outcome of the judgment debtor's application and the judgment debtor's appeal. Having allowed its battle to be fought by the judgment debtor, and the judgment debtor having failed in its arguments, the respondent then opposed encl 9 on exactly the same grounds thereby relitigating the issue and effectively seeking to reverse Lau Bee Lan J's finding through the back door. Under the circumstances, the respondent should not be allowed to reopen the case and it is bound by the decision given by Lau Bee Lan J.

[115] In support of his argument that the respondent was bound by the decision of Lau Bee Lan J on the issue, learned counsel relied on the principle

of law laid down by the Privy Council in *Nana Ofori Atta II v Nana Abu Bonsra II* which was also relied upon by the High Court in dismissing the respondent's appeal against the decision of the senior assistant registrar given on 8 October 2013 in respect of encl 9 whereby the garnishee order absolute was made against the respondent.

[116] It was also contended by learned counsel for the appellant that what was done by the respondent amounted to an abuse of the process. In support of that proposition the Singapore High Court case of *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] SGHC 132 was cited.

[117] Learned counsel for the respondent, on the other hand, submitted that the decision of Lau Bee Lan J on the judgment debtor's application to set aside the garnishee order to show cause against the respondent could not bind the respondent regardless of whether the respondent had chosen to participate in the proceedings or otherwise. It was contended by learned counsel for the respondent that the case of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* and *Nana Ofori Atta II v Nana Abu Bonsra II* cannot be applied to the instant case because the judgment debtor's application was a separate proceeding unrelated to the issue or cause of action between the appellant and the respondent. This was also the finding of the Court of Appeal on 3 October 2014.

[118] It was also contended by the respondent that the decision in the judgment debtor's application had not fully ventilated or fully adjudicated the issue on the respondent's right to set off the judgment debtor's six fixed deposit accounts. As such, the principle of res judicata raised by the appellant was not applicable to the respondent's case. The judgment debtor's application did not affect or take away the rights of the respondent which is provided under O 49 of the Rules of the High Court 1980 to dispute its liability as a garnishee separately against the appellant and/or show cause why the garnishee order nisi obtained by the appellant ought not to be absolute.

[119] Alternatively learned counsel for the respondent submitted that the appellant had failed to inform the court and take steps at first instance to consolidate the judgment debtor's application with the respondent's appeal (encl 164) pursuant to O 4 r 1 of the Rules of High Court 1980. The appellant had chosen to defend against the judgment debtor's application separately. As such the appellant cannot now blame the respondent for failing to intervene with the judgment debtor's application. In support of that proposition learned counsel for the respondent cited the cases of *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184; [1987] CLJ (Rep) 160 and *Mayban Trustee Bhd v Amalan Tepat Sdn Bhd & Anor* [2006] 3 MLJ 82; [2006] 5 CLJ 43.

[120] As respondent was not bound by the outcome of the decision from the proceedings in the judgment debtor's application, learned counsel for the respondent urged this court to answer question no 1 for this appeal in the negative.

[121] At para 14 of her judgment the learned judge made the following observation:

> 14. Secondly, flowing from the fact that the money in the RHB account was declared in the Singapore Judgment as far back as 30.8.2002 as held on trust for the JC and that the account numbers in Schedule 9 of the Singapore Judgment are the same as the numbers of the accounts held by RHB, subject of the garnishee proceedings, there is evidence to prove that RHB Bank was served with the Garnishee Nisi Order, ex-parte Summons in Chambers and the Affidavit in Support to which the Singapore Judgment was annexed, on 21.1.2004 at the latest (exh.II-8, paragraph 5(a) in encl.58). However about 1[bd] months after RHB Bank became aware of the provisions of the Singapore Judgment and the garnishee proceedings, they exercised their right of set-off on 10.3.2004 which they were not entitled to do so as stated in The Law Relating to Banker and Customer in Australia –
>
> (i) There is no right to set off the balance of an account which the bank knows to be a trust account against the customer's indebtedness in other accounts. (para 3.4260); and
>
> (ii) In *Neste Oy v Lloyds Bank plc (The Tiisken)* [1983] 2 Lloyd's Rep 658... it was held that PSL was a constructive trustee of the payment and that the bank's knowledge of the facts put it on inquiry. For this reason the bank could not assert any right of set-off with respect to that payment.

[122] In *Nana Ofori Atta II v Nana Abu Bonsra II* there was a dispute about the title to certain lands in Ghana belonging to the respondent. Both the appellant and the respondent were chieftains in Ghana. Some 16 years earlier, a chieftain subordinate to the appellant had laid claim to the same lands. The appellant, who was the person really interested in the lands in dispute, had knowingly stood by while the earlier action was fought out.

[123] The question in the appeal before the Privy Council was whether it was open to the appellant to litigate in the action on the title to the lands in dispute. The question was whether the earlier finding precluded the appellant from now claiming title against the respondent. The respondent contended that the appellant was so precluded on one or other of the two grounds: (1) estoppel by res judicata on the ground that a chieftain subordinate to the appellant was a party to the previous proceedings and the appellant was a privy to them; or alternatively, (2) estoppel by conduct on the ground that the appellant knowingly stood by whilst the title was fought out by their subordinate in the previous proceedings and it would be inequitable to allow them to bring up the question again.

[124] Jackson J upheld the contention of the respondent on the second ground. The West African Court of Appeal upheld the contentions of the respondent on both grounds. The result was that the appellant's claim had been dismissed.

[125] In dismissing the appeal, the Privy Council held that the appellant was estopped by its conduct from litigating the issue all over again. Lord Denning, who delivered judgment for the court, opined that the principle formulated by Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P & D 327 at p 328 that 'if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case,' was applicable to the case.

[126] The principle formulated by Lord Penzance in *Wytcherley v Andrews* was also applied by our Court of Appeal in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor*. In that case the first respondent had obtained an order for certiorari to quash the second respondent's approval of the proposed development to be undertaken by the applicant. The applicant did not apply to intervene in the High Court and it was only after the order for certiorari was granted that the applicant applied to be added as a party for the purpose of appealing separately to the Court of Appeal. This application was dismissed and instead of appealing against the dismissal the applicant moved the Court of Appeal by a notice of motion for an order that it be permitted to take part as an intervener in the appeal.

[127] In dismissing the application, the Court of Appeal held that the principle formulated by Lord Penzance in *Wytcherley v Andrews* applied against the applicant. The Court of Appeal said that a person who had been served with papers pursuant to O 53 r 2(5) of the Rules of the High Court 1980 may decide whether to confine himself to address the judge if called upon by the judge, or go further and apply to have himself added as a party to enable him to exercise the right of appeal. The applicant had the requisite knowledge and opportunity to intervene to have itself added as a party to the substantive motion, but failed to do so at the earliest opportunity. The applicant having elected to confine itself to the limited right given to it by the rule cannot now claim to have an independent right of appeal.

[128] The issues of whether a previous decision involving different plaintiffs had decided legal and equitable rights of defendants and whether previous decision of court capable of operating in rem and binding upon world at large including a non-party to a previous action were considered by the High Court of Singapore in *Kwa Ban Cheong v Kuah Boon Sek and Others*. In that case, the plaintiff was the personal representative of Quah Koon Ann ('QKA'). QKA was the son of Quah Hing Soo ('QHS'). QHS died intestate. He was the founder

of Quah Hiang Soo Pte Ltd ('the company'). The defendants were three of QHS's sons and the administrators of the fourth son's estate.

[129] The action concerned 360 shares ('the shares') in the company. By a directors' resolution dated 10 March 1976, QHS transferred the shares to his four sons in equal shares. Two days after the resolution was passed, QHS wrote a note which essentially stated that the Shares were to be entrusted to the joint management of the four sons and that future dividends were to be distributed to the children of Kuah Khoon Loon and Wong Tuck Yoke as supplement for the schooling expenses of the children.

[130] In 1997, Lin Ke, one of the children of Kuah Khoon Loon, brought an action against the defendants. He claimed that by reason of the note, the defendants held the shares on trust for the benefit of the children of Kuah Khoon Loon and Wong Tuck Yoke. Amarjeet Singh JC found that QHS had absolutely and validly divested himself of the shares by making a gift of them to the four sons. The Court of Appeal dismissed Lin Ke's appeal.

[131] The plaintiff's case was that the shares were held by the defendants on a resulting trust for the estate of QHS and were to be distributed to his beneficiaries according to the Intestate Succession Act. The plaintiff, inter alia, argued that he was not bound by the earlier decision because he was not party to that action.

[132] The Singapore High Court held that a collateral attack on a final decision could be an abuse of process and the defendant who was sued in that situation was entitled to have the proceedings dismissed as an abuse of process. The present action against the same defendants was an attempt to relitigate issues and a collateral attack on the first action as to the title to the shares had already been determined. It was further held that apart from abuse of process, the action had to fail because the decision of Amarjeet JC operated in rem to settle the legal and beneficial interest of the defendants in the Shares. Every judgment in rem was conclusive and binding upon the world at large and was not limited in its binding effect to those who were parties to the proceedings and their privies.

[133] At paras 38–40 of the judgment the learned trial judge said:

> [38] Apart from abuse of process, a separate and independent ground why the plaintiff's action must fail is because the decision of Amarjeet Singh JC operates in rem. Every judgment in rem is conclusive and binding upon the world at large and is not limited in its binding effect to those who were parties to the proceedings and their privies. L P Thean JA delivering the judgment of the Court of Appeal in *Payna Chettiar v Low Meng Seng* [1998] 2 SLR 289 at 24 said:
>
> > In particular, a judgment in rem declaring the rights and title to a property to all

the world is one which all persons are bound to observe and comply with.

[39] An exposition of the relevant principles on judgment in rem is found in para 251 of Spencer Bower, Turner and Handley, the *Doctrine of Res Judicata* (3rd Ed, 1996). It reads:

> To establish that a decision operates in rem and determines the status of a thing, all other conditions of a valid res judicata estoppel must be satisfied.

[40] At para 19, the authors set out the constituents of res judicata estoppel. They are:

(i) the decision was judicial in the relevant sense;

(ii) it was in fact pronounced;

(iii) the tribunal had jurisdiction over the parties and the subject matter;

(iv) the decision was –

(a) final, and

(b) on the merits;

(v) it determined the same question as those raised in the later litigation; and

(vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

[134] The appeal against this decision was dismissed by the Singapore Court of Appeal on 21 October 2003.

[135] Having carefully considered the facts and circumstances of the instant case and the authorities discussed above I agree with the submission of learned counsel for the appellant that the respondent is estopped by conduct from relitigating the issue relating to its right of set off. With respect, I am unable to agree with the finding of Court of Appeal that the respondent had no duty to intervene in the judgment debtor's appeal to set aside the garnishee order to show cause before Lau Bee Lan J. From the judgment of Lau Bee Lan J it is clear that one of the issues before her was whether the respondent was entitled to exercise a right of set off over the monies in the six fixed deposit accounts. In her judgment she held that the respondent was not entitled to do so.

[136] The respondent was content to stand by and see its battle fought by the judgment debtor on the issue of its right of set off over the six fixed deposit accounts and as such it was bound by the result. In my judgment the principle formulated by Lord Penzance in *Wytcherley v Andrews* applies to the respondent. The respondent cannot be allowed to reopen the case. Further, the decision of Lau Bee Lan J relating to the six fixed deposit accounts operated in rem to settle the rights of the respondent on the monies in the six fixed deposit accounts. The decision was conclusive and binding upon the respondent.

[137] In light of the foregoing I would answer the first question of law posed in this appeal in the affirmative. By answering the first question posed in this appeal in the affirmative I find it unnecessary to deal with the other two issues canvassed by learned counsel for the appellant and to answer the second and third question of law posed in this appeal as my finding on the first question is sufficient to dispose of this appeal.

[138] For the reasons given the appeal by the appellant is allowed with costs. My learned brother Abdull Hamid Embong FCJ has read the draft of my judgment and has expressed his agreement with it.

Appeal dismissed with costs of RM20,000.

Reported by Kohila Nesan